Supreme Court, U. S.
FILED
JAN 12 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975
No. 75-328

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOSEPH V. ORLEANS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS ON THE MERITS

PFAU, COMSTOCK & SPRINGER
WILLIAM E. PFAU, JR.
900 City Centre I
Youngstown, Ohio 44503

SQUIRE, SANDERS & DEMPSEY
CHARLES F. CLARKE
JAMES P. MURPHY
1800 Union Commerce Building
Cleveland, Ohio 44115
Counsel for Respondents

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Citations to Opinions Below 1
Jurisdiction 2
Statutes Involved 2
Questions Presented for Review 3
Statement of the Case 3

A. Introduction 3
B. The Single Affidavit of Petitioner Was Rebutted by Respondents and an Issue of Fact Exists in This Case 5
C. The WTCEO Was Organized Solely for the Purpose of Receiving OEO Grant Funds and, in Fact, Its Only Funds Were OEO Funds 7
D. OEO Exercised Day-to-Day Control and Supervision Over Virtually Every Aspect of the Operation of the WTCEO 8

Summary of Argument 21
Argument 22

A. The Economic Opportunity Act of 1964 Made It the Policy of the Federal Government to Eliminate Poverty and This Policy Was Implemented by Means of Community Action Agencies 22
B. The Federal Tort Claims Act Should Be Liberally Construed in Order to Accomplish Its Purpose of Extending Protection to the Public 24
C. The Determination of What Entities Are Federal Agencies Is a Pragmatic One Based on the Activities of the Entity's Operations 28
D. OEO Exercised Control and Reserved an Unlimited Right to Control the WTCEO, an Entity Engaged in Implementing Governmental Policy.

In These Circumstances Logic and Precedent Compel the Conclusion That the WTCEO Was an Instrumentality or Agency of the United States 32

Conclusion 40

TABLE OF AUTHORITIES

Cases

City of Pittsburgh v. United States, 359 F.2d 564 (3d Cir. 1966) 26
Delgado v. Akins, 236 F. Supp. 202 (D. Ariz. 1964) 33
Duba v. Schuetzle, 303 F.2d 570 (8th Cir. 1962) 33
Gilroy v. United States, 112 F. Supp. 664 (D. D.C. 1953) 26
Logue v. United States, 412 U.S. 521 (1973) 29, 30, 31, 40
Martarano v. United States, 231 F. Supp. 805 (D. Nev. 1964) 34
Merchants Nat'l Bank & Trust Co. of Fargo v. United States, 272 F. Supp. 409 (D. N.D. 1967) 26
O'Toole v. United States, 206 F.2d 912 (3d Cir. 1953) 26
Pittman v. United States, 341 F.2d 739 (9th Cir. 1965), *cert. denied* 382 U.S. 941 (1965) 26
Rushford v. United States, 92 F. Supp. 874 (N.D. N.Y. 1950), *aff'd* 204 F.2d 831 (2d Cir. 1953) 26
Schetter v. Housing Authority of the City of Erie, 132 F. Supp. 149 (W.D. Pa. 1955) 28, 37, 40
Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951) 26
State of Maryland v. Manor Real Estate and Trust Co., et al., 176 F.2d 414 (4th Cir. 1949) 37

Toth v. United States, 107 F. Supp. 37 (N.D. Ohio 1952) 39
United States v. Alexander, 238 F.2d 314 (5th Cir. 1956) 26
United States v. Holcombe, 277 F.2d 143 (4th Cir. 1960) 36
Witt v. United States, 462 F.2d 1261 (2d Cir. 1972) 26, 35

Text

RESTATEMENT (SECOND) OF AGENCY § 2 (1958) 30, 31

Statutes

45 Code of Federal Regulations, Parts 1067-1070, pp. 218-259 (1974) 10, 12, 14, 32, 35
Economic Opportunity Act of 1964, Title II, 78 Stat. 516, as amended, 42 U.S.C. § 2781, et seq. 3, 4, 5, 7, 8, 21, 22, 23, 24, 40
Federal Rules of Civil Procedure, Rule 56 ..... 6, 21
Federal Tort Claims Act, 28 U.S.C. 1346(b) 2, 3, 6, 21, 22, 24, 26, 27, 29
Ohio Revised Code, Chapter 1702 7
28 U.S.C. 1254(1) 2
28 U.S.C. 2671 ..... 2, 4, 21, 25, 31, 33, 34
42 U.S.C. 2701-2995(d) 22
42 U.S.C. 2781 8
42 U.S.C. 2790 8
42 U.S.C. 2790(a) 32
42 U.S.C. 2791 32-33
42 U.S.C. 2791(b) 20
42 U.S.C. 2796(b) 32
42 U.S.C. 2811 8
42 U.S.C. 2836(7) 11
42 U.S.C. 2941 8

Other

H. R. REP. No. 286, 70th Cong., 1st Sess. (1928) 6, 7 26
H. R. REP. No. 667, 69th Cong., 1st Sess. (1926) 6, 7 26
H. R. REP. No. 2800, 71st Cong., 3rd Sess. (1931) 12 26
Print of S. 4377, 71st Cong., 2d Sess. (1930) §301 26
1964 U.S. Code Congressional and Administrative News, Vol. 2, p. 2910 24

Supreme Court of the United States

October Term, 1975
No. 75-328

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOSEPH V. ORLEANS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS ON THE MERITS

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 509 F.2d 197 (6th Cir. 1975). That Court's order denying rehearing is not reported. The opinions and orders of the District Court are not officially reported. The opinions of the District Court and the Court of Appeals are reproduced in the appendix filed in this Court by Petitioner with its Petition for a Writ of Certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 13, 1975. A motion for a rehearing and suggestion for a hearing *en banc* was denied on April 2, 1975. The Petition for a Writ of Certiorari was filed August 30, 1975, and was granted on October 20, 1975. The jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The Federal Tort Claims Act provides in pertinent part:

28 U.S.C. 1346(b):

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2671:

As used in this chapter and sections 1346(b) and 2401 (b) of this title, the term "Federal agency" includes the executive departments, the military departments,

independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

* * * * *

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Warren-Trumbull Council for Economic Opportunity, a Community Action Agency which was organized for the sole purpose of receiving funds from the Office of Economic Opportunity pursuant to the Economic Opportunity Act of 1964, which received all of its cash funds from the OEO, and which was closely regulated and supervised thereby, is a "corporation primarily acting as [an] instrumentalit[y] or agenc[y] of the United States" so as to make the United States liable for the torts thereof pursuant to the Federal Tort Claims Act.

STATEMENT OF THE CASE

A. Introduction.

This is an action brought pursuant to the Federal Tort Claims Act to recover money damage caused Respondents

by reason of personal injuries and loss of services resulting from an automobile accident which occurred on September 3, 1970, in Mercer County, Pennsylvania. Joseph V. Orleans, then fifteen years old, suffered an injury which resulted in the amputation of his right arm when the automobile in which he was a passenger left the road and struck a parked truck. The automobile was filled with children on an outing organized and sponsored by the Westlawn Neighborhood Opportunity Center, an activity of the Warren-Trumbull Council for Economic Opportunity, Inc. (hereinafter referred to as WTCEO). (See generally, Walker Depo., pp. 4, 5, 8 and 10.)

The WTCEO is a non-profit corporation which was organized specifically to become and was at all times relevant a Community Action Agency of the Office of Economic Opportunity (now the Community Services Administration, but herein referred to as OEO) pursuant to Title II of the Economic Opportunity Act of 1964, 78 Stat. 516, as amended, 42 U.S.C. § 2781, et seq. (App. 31 and 36).[1]

Following the filing of a complaint on March 17, 1972, and an answer thereto, Petitioner United States of America filed a motion for summary judgment on the theory that the WTCEO was not a "federal agency" within the meaning of that term as defined in 28 U.S.C. § 2671. Following substantial discovery, District Court Judge Leroy J. Contie, Jr., sustained Petitioner's motion (Pet. App. 17a). Subsequent to a motion for reconsideration filed by Respondents, the Court issued a Memorandum Opinion and Order which affirmed the earlier opinion (Pet. App. 22a).

---

1. "App." herein refers to the Joint Appendix. "Pet. App." herein refers to the Appendix which is a part of the Petition for a Writ of Certiorari.

A Notice of Appeal was duly filed with the United States Court of Appeals for the Sixth Circuit. On January 18, 1975, the Sixth Circuit, Pierce Lively, J., reversed the District Court, held that summary judgment improperly had been granted to the United States of America, and remanded the case to the District Court "for further proceedings consistent with this opinion." (Pet. App. 1a-16a).

The Court of Appeals recognized that the WTCEO was created for the purpose of carrying out the community action program of the Economic Opportunity Act of 1964, that it received no funds from sources other than the Office of Economic Opportunity (OEO), that no programs other than those formulated and funded by the federal government were conducted by the WTCEO, and that "even a cursory reading of the voluminous regulations of OEO leaves one with the distinct impression that an organization required to operate in compliance with these guidelines must indeed be a federal instrumentality." (Pet. App. 14a). The Court of Appeals also found highly significant the facts that OEO once stopped funding the WTCEO until the WTCEO reorganized the Council, and that as part of such reorganization, OEO directly appointed the new chairman of the governing board of WTCEO (Pet. App. 12a). Because of these specific facts and other such facts, the Court of Appeals held that summary judgment improperly was granted.

B. The Single Affidavit of Petitioner Was Rebutted By Respondents and an Issue of Fact Exists In This Case.

This litigation comes to this Supreme Court in the procedural posture of summary judgment. Summary judgment may be granted properly only where there exists "no

genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." (Rule 56, Federal Rules of Civil Procedure). A genuine issue of fact not only exists, but on the evidence before this Court of Appeals it is clear that the WTCEO was a federal agency.

Petitioner contends that the WTCEO was not a federal agency, but in support of this contention Petitioner submitted only one affidavit (App. 8). Moreover, only a single paragraph of that affidavit, paragraph six, addresses itself to the relevant issue. The language in that paragraph is conclusory only and contains no substantive facts to support the conclusions contained therein. In response, Respondents submitted three affidavits and five depositions. These affidavits and depositions detail specific incidents relating to the organization, the daily operation, and the extensive regulation of the WTCEO by the Office of Economic Opportunity. Respondent's submission, together with the regulations Memoranda, Instructions and guidelines promulgated by the Office of Economic Opportunity, when taken together, reveal that the WTCEO was organized for the sole purpose of receiving OEO grant funds, had no funds other than federal funds, and was directly and immediately controlled and supervised in its daily activities by the Regional Office of the OEO.

Taken together, those affidavits, depositions, and the regulatory scheme establish that the WTCEO, on the facts of this case, operated as a "federal agency" as defined by the Federal Tort Claims Act. At the very least, this evidence rebuts Petitioner's single affidavit and establishes that a genuine issue of material fact exists as to whether the WTCEO is a corporation primarily acting as an instrumentality or agency of the United States, and therefore is a "federal agency" as defined in that Act.

C. The WTCEO Was Organized Solely for the Purpose of Receiving OEO Grant Funds and, In Fact, Its Only Funds Were OEO Funds.

The affidavit of William [illegible] McLain, the attorney who incorporated the WTCEO, avers that "the purpose of organizing and incorporating this entity [the predecessor to the WTCEO] was to obtain funds from the Federal Government under the Economic Opportunity Act of 1964 by setting up an agency to act as an instrumentality to carry out the purposes and intentions of the Economic Opportunity Act of 1964." (App. 31). Further, the affidavit of John L. Breckenridge, former president and member of the Board of Trustees of the predecessor to the WTCEO, states that the WTCEO:

> "was formed for the purpose of obtaining funds made available through the Economic Opportunity Act of 1964 and to act primarily as an instrumentality of the United States by carrying out the purposes of the Economic Opportunity Act. The corporation was carefully organized and the by-laws and regulations tailored to come within the restrictions of the Economic Opportunity Act." (App. 36-38).

The WTCEO is a non-profit corporation incorporated pursuant to Chapter 1702, Ohio Revised Code (App. 32). Naturally, the articles of incorporation contain numerous provisions which are required by that chapter of the Revised Code. While these provisions may permit the corporation to act as other than a federal agency, the affidavits submitted by Respondents demonstrate that the sole purpose in establishing the WTCEO was to receive federal funds pursuant to the Economic Opportunity Act of 1964 and to act primarily as an instrumentality of the federal government.

The affidavits of Mr. Breckenridge (App. 36) and Mr. Sidney I. Roberts (App. 38), chairman of the governing board of the WTCEO, also state that the total cash funding of the WTCEO was supplied by the Office of Economic Opportunity. Some "in kind" services were provided by others, but no cash was provided (Pet. App. 22a-23a). Mr. Breckenridge further avers that the projects undertaken by the WTCEO were those suggested by the Economic Opportunity Act or the directive of the OEO, and that the Westlawn Neighborhood Opportunity Center was one of such projects (App. 37). Thus, regardless of the potential of the WTCEO to engage in non-OEO projects, the uncontroverted fact is that the WTCEO activity in which Respondent was involved when he was injured was an OEO project.

D. OEO Exercised Day-to-Day Control and Supervision Over Virtually Every Aspect of the Operation of the WTCEO.

The Economic Opportunity Act of 1964, as amended through December 30, 1969, and effective on September 30, 1970, when this accident occurred, provides for *"the creation and funding of 'Community Action Agencies'"* and the carrying out of certain programs by said agencies (42 U.S.C. §§ 2781 and 2790). The Act also provides for the development of "neighborhood centers" by the Community Action Agencies (42 U.S.C. 2811). The Act further creates the Office of Economic Opportunity to be headed by a Director appointed by the President with the advice and consent of the Senate (42 U.S.C. 2941), and to be part of the Executive Office of the President.

The WTCEO is a Community Action Agency funded by OEO, as admitted by Wendell Verduin, Regional Director of OEO, Chicago Region (App. 9). As such, it

is subject to the detailed regulatory and supervisory scheme promulgated by OEO, which scheme permeates virtually every aspect of a CAA's operation. This regulatory scheme was promulgated by means of Community Action Memoranda, OEO Instructions, duly adopted regulations published in the Code of Federal Regulations, the imposition of grant conditions, and direct personal interference. Significantly, Community Action Memo 9(a) of February 21, 1967, promulgated by the national office of OEO, specifically recognizes that "[t]*he principal instrument through which community action programs are carried out is the Community Action Agency.*" (Emphasis added).

Generally, with respect to the degree of control exercised by OEO, the affidavit of Mr. Breckenridge is revealing:

> "The Affiant says that from the time of the organization of the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center, the Warren Council for Economic Opportunity, Inc. and Westlawn Neighborhood Opportunity Center acted as agencies to serve and assist the poor in the methods and manners outlined and prescribed by the Economic Opportunity Act and numerous instructions, restrictions and requirements of the Director of the Office of Economic Opportunity. These instructions and requirements directed the manner in which the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center be organized, the classes of persons who were to be employed as directors or serve as trustees, the nature and purpose of the projects to be undertaken and the methods for carrying out such projects. Before funding was granted, the United States of America,

through the Office of the Director of Economic Opportunity and his regional directors, was required to approve projects and the outlined approach for conducting them. After a project was approved, its operation was supervised by the Office of the Regional Directors in Chicago.

"Without the Economic Opportunity Act and the funds made available thereunder, the Warren Council for Economic Opportunity, Inc. would not have been created and could not have operated or existed." (App. 37-38).

Review of the relevant Community Action Memoranda and the Code of Federal Regulations confirms the statements made by Mr. Breckenridge.

The regulatory scheme promulgated by OEO with respect to each Community Action Agency is contained, in part, in 45 C.F.R., Parts 1067-1070, pp. 218-259 (1974).[2] Without intending to be exhaustive, those regulations provide the following:

Subpart 1067.1 provides for the suspension and termination of assistance for "failure of a recipient to comply with applicable laws, regulations, Community Action Memoranda, standards, issued program guidelines, OEO Instructions, assurances, grant conditions or approved work programs." (p. 219). Moreover, suspension of funding may be made by OEO summarily if an OEO official believes that to be proper (p. 221).

The finances of an OEO grantee are most closely regulated (Subparts 1067.3-1068.4). For example, grantees re-

2. All page references herein are to 45 C.F.R., Parts 1067-1070 (1974), published by the Office of the Federal Register, National Archives and Record Service, General Services Administration.

ceive their funds by means of a Letter of Credit. OEO regulations require that a grantee not withdraw more funds than are necessary for the following thirty days. Otherwise, the Letter of Credit will be revoked by OEO (p. 228). The accounting method to be followed by a CAA is set forth in OEO Instructions 6100-1 and it must be followed (p. 236). All income, including non-federal money, and all costs, including costs not paid for by federal money, must be accounted for and reported to the government (pp. 236-237). All personnel costs must be reported (p. 237).

Administrative costs are closely regulated and may not exceed fifteen percent of the total cost of any grant program, regardless of the source of funds used to pay those costs (p. 237). Further, in the event administrative costs are, in the opinion of the Director, excessive, he may order a CAA to take "specific actions to reduce their administrative costs and improve their operational effectiveness" (p. 237). 42 U.S.C. § 2836 (7) further provides:

". . . In any case in which the Director determines that the cost of administering such programs does not exceed 15 per centum of such total costs but is, in his judgment, excessive, he shall forthwith *require* such community action agency *to take such steps prescribed by him* as will eliminate such excessive administrative cost, including the sharing by one or more such community action agencies of a common director and other administrative personnel. . . ." (Emphasis supplied).

Further, a CAA periodically must file a detailed report concerning *all* of its expenditures (p. 238). A CAA is prohibited from using grant funds to pay interest or other charges incurred to borrow funds without prior permission of OEO (p. 239). (Thus, when a CAA has no funds other

than federal funds, as is the case here, any borrowing is impossible without OEO approval.)

Subpart 1068.5-1 concerns "allowances and reimbursements for members of policy making bodies" and applies by its terms to all members of policy making bodies of organizations receiving financial assistance from OEO, i.e., these proscriptions apply to the use of both federal and non-federal funds. Allowances for attendance at meetings are limited to a maximum of $5.00 per meeting, and meal expenses and travel expenses are to be paid pursuant to the Standardized Government Travel Regulations. The regulations are so comprehensive that even the rate of babysitting expenses ($1.60 per hour) is prescribed, as are other similar costs, such as lunch and dinner expenses (pp. 242-243).

Part 1069 of 45 C.F.R. concerns itself with personnel management. These regulations are extensive and regulate virtually every aspect of a CAA's employment program. For example, the permissible limits of direct action, e.g., demonstrating, etc. are defined and are made applicable to every community action "employee or volunteer" (p. 249). Limitations with respect to unlawful demonstrations, rioting and civil disturbances apply "to all full-time and part-time employees and volunteers engaged in carrying out the program of any organization financially assisted under the Economic Opportunity Act of 1964." i.e., regardless of whether the employee in question is engaged in a program assisted by federal funds or by funds received from other sources (p. 249). A CAA is required to screen out persons who are likely to take place in unlawful demonstrations *and to terminate people who do* (p. 251).

Personnel policies also are controlled by Community Action Memoranda. For example, memorandum No. 23 (attached to the affidavit of Sidney I. Roberts) requires that:

> "Each grantee and delegate *agency must develop and submit to the OEO Regional Office for its approval a formal plan which details the personnel policies* and procedures the grantee will follow with respect to employees supported by OEO funds or cash contributions to the employees supported by OEO funds *or cash contributions to the non-Federal share.*" (Emphasis supplied).

The personnel plan must describe the following, all of which must be approved by OEO:

> "1. *Positions and salaries.* The duties and responsibilities of each job or position in the OEO-financed program and the salary of each position (classification and pay plan). The qualifications to be required of persons occupying each position (work experience, academic preparation, etc.) and the procedures to be used in evaluating applicants (reference checks, interviews, etc.)
>
> 2. *Employee Advancement and performance.* Policies followed with respect to periodic pay raises, promotions, and separations and the criteria used to evaluate employee performance.
>
> 3. *Employee benefits.* Benefits offered, (vacations, sick leave, workmen's compensation, social security, etc.), and the details of the agency and employee contribution to any benefit plans (hospitalization, etc.)
>
> 4. *Employee activities.* Policies governing employee participation in employee groups or unions and a description of the machinery employed to consider employee grievances." (pp. 1-2)

Memorandum 23 also provides that all "salary increases . . . will be subject to review by OEO" (p. 4), prohibits overtime payments for persons earning in excess of $7,000.00 per annum (p. 4), and reserves the right to control CAA participation in employee benefit plans (p. 5).

Travel of all employees employed by CAA is closely regulated by subpart 1069.3. The travel regulations of a CAA may not be less restrictive than the Standardized Government Travel Regulations (pp. 251-252).

Lobbying activities of a CAA are subject to "very sharp limitations" (p. 254), and while the restrictions apply only to "project funds", significantly that term is defined as applying to both federal and matching non-federal shares of approved program budgets, i.e., such restrictions are not applied solely to federal funds (p. 255).

Part 1070, 45 C.F.R., entitled "Community Action Program Grantee Operations" eliminates whatever doubt might exist as to the public agency character of a CAA. This Part requires every CAA to make available "for public inspection and examination" virtually every document in the CAA's possession (pp. 256-257). The regulations set forth the hours when inspection shall be permitted and the documents which may be inspected (p. 257). If an individual CAA does not want to permit inspection of a particular document, it must obtain the written approval of OEO not to do so (p. 257). In addition, all meetings of grantees must be "open to all members of the public" (p. 259), and this requirement "applies to all activities of that agency," i.e., not just federally financed or assisted activities (p. 258). The CAA must permit any member of the public to speak at these meetings (p. 259).

Stringent as the regulatory scheme described above is, it literally pales by comparison with the *actual* control

and supervision exercised by OEO over the WTCEO. The Sixth Circuit relied heavily on actual control and the particular facts of this case when it stated:

> ". . . On the other hand, by withholding approval of its operations, OEO had for all intents and purposes put WTCEO out of business for a period of time and had in October 1972 selected a new chairman of its board who completely reorganized the agency. These are not powers usually possessed by a principal in dealing with an independent contractor."

The District Court also acknowledged, to some extent, the extent of actual control when it held that "the Council conducted no programs other than those formulated and funded by the federal government" (Pet. App. 23a), and that "the Office of Economic Opportunity and its regional office in Chicago exercised close supervision over the Council and its activities" (Pet. App. 23a). The District Court also admitted:

> "The court recognizes that the Office of Economic Opportunity exercises '*very close supervision*' over the general organization of community action agencies and over their financial dealings and Federally funded programs.
>
> "The court even recognizes the fact that *Federal funding was stopped to the Warren-Trumbull Council* until the Council was reorganized and that the *Regional Director of the Office of Economic Opportunity appointed Sidney I. Roberts as chairman of the governing board to implement the reorganization.*" (Pet. App. 26a). (Emphasis added).

Of particular importance in this case are the affidavits of the persons associated with the WTCEO. (Those per-

sons, of course, are not parties in this litigation.) For example, the affidavit of Sidney I. Roberts describes his direct appointment to the chairmanship of the governing board of the WTCEO by the Regional Office of Economic Opportunity:

> "Personally appeared before me SIDNEY I. ROBERTS, who after first being duly sworn and affirmed, says that in October of 1972, he was appointed directly by the Regional Office of the Office of Economic Opportunity to be chairman of the governing board of The Warren-Trumbull Council for Economic Opportunity and that he was asked by the Chicago Regional Office to re-organize the Warren-Trumbull Council for Economic Opportunity." (App. 38).

This assertion is confirmed in the deposition of Lester Peterman, former executive director of the WTCEO, pp. 30-31 thereof.[3]

OEO control over personnel of the WTCEO was emphasized by Mr. Peterman, who testified that Mr. Penzak, an employee of the Regional Office of OEO, discussed with him whether certain hirings and firings had been carried out in accordance with OEO guidelines (Peterman Depo., p. 15). Further, Mrs. Ellen Stanton testified that there existed in her office a "blue book" which set forth "what was expected of us, what days we had off, [etc.]." So far as Mrs. Stanton was aware, that publication came "from Chicago" (Stanton Depo., p. 29).

---

3. Petitioner, understandably, wants to ignore this highly important evidence of the fact that the WTCEO is not an independent contractor, and does not mention it until p. 21 of its Brief. But even when Petitioner mentions it, it inaccurately states that funding was cut off by OEO until a new Chairman "had been selected." Mr. Roberts' affidavit states that he was "appointed directly by the Regional Office of the Office of Economic Opportunity to be chairman of the governing board of . . ." (App. 38).

Even Wendell Verduin, the Chicago Regional Director of OEO, admitted that the Regional Office supervises salary limitations, salary increases, and the approval of other personnel actions. Mr. Verduin denied that OEO hires and fires individual persons, but this denial contradicts and flies in the face of the action of OEO with respect to Sidney I. Roberts (Verduin Depo., pp. 30-31). Mr. Verduin also admitted that OEO assures that a CAA has "a wage scale that is comparable to the wage scales of comparable organizations and communities that they serve." (Verduin Depo., p. 32). Further, as shown above, Community Action Memorandum 23 contains numerous instructions with respect to the employment of personnel.

In addition to control over personnel, travel, public access to information, administrative costs, accounting, and audits, significantly the Office of Economic Opportunity also controls and supervises the various programs undertaken by a CAA. For example, Mr. Verduin admitted with respect to the purpose of OEO and its monitoring of grant funds:

> "Q. . . . And the purpose, the whole purpose of the OEO is to get the federal funds spent in such a fashion as to carry out the intent of Congress in the Economic Opportunity Act, isn't that correct?
>
> * * * * *
>
> "The Witness: Well, I am not sure that I would state that that is the whole purpose of OEO, but obviously OEO—
>
> By Mr. Pfau:
>
> "Q. Well, a prime purpose?
>
> "A. Yes.
>
> *"The prime purpose of OEO is to carry out the Economic Opportunity Act as amended.*

"Q. And the Warren-Trumbull Council of Economic Opportunity was one of the agencies appointed or chosen by the Office of Economic Opportunity as a recipient of funds to carry out the purpose of the congressional act, isn't that correct?

"A. It was. The Warren-Trumbull Community Action agency received recognition by OEO to receive funds to carry out programs in that community, programs that it determined necessary to implement.

"Q. Well, the instrument—

"A. In compliance with the Act and its regulations.

"Q. *To implement the purposes of Congress and the Economic Opportunity Act, isn't that correct?*

A. *Yes.*" (Emphasis added).

OEO Instruction 6002-01 gives OEO ultimate control over any program adopted by a CAA, as Mr. Verduin admitted in his deposition (pp. 1-17):

"Q. Well, OEO Instruction 6002-01 provides, does it not, that 'The applicant agency has considerable flexibility in determining what activities it will undertake, the manner in which these activities will be undertaken, and the families and individuals that will be assisted, *subject to the policies in this guide and to such further policies and procedures as may be issued by the Office of Economic Opportunity,' isn't that correct?* (Emphasis added).

"Mr. McGinness: What regulation are you reading from?

"Mr. Pfau: 6002-01. Do you have those there?

"Mr. Ring: It's in there.

By Mr. Pfau:

"Q. I think I have read that verbatim from your report, isn't that correct?

"A. That's correct.

"Q. And that is an instruction that is given to every Community Action agency, is it not?

"A. That's correct.

"Q. And it is binding upon each such agency, isn't that correct?

"A. That's correct.

"Q. *And specifically advises each such agency that in the future the OEO may enact other policies and procedures which will be binding upon that Community Action agency, isn't that correct?*

"A. *That's correct.*" (Emphasis added).

The affidavit of Mr. Breckenridge, a past president and member of the Board of Trustees of the WTCEO, states as follows with respect to specific governmental approval of individual programs and the method of conducting them:

> "Before funding was granted, the United States of America, through the Office of the Director of Economic Opportunity and his regional directors, was required to approve projects and the outlined approach for conducting them. After a project was approved, its operation was supervised by the Office of the Regional Directors in Chicago." (A. 11).

In its brief, Petitioner grossly understates the degree of federal control over the WTCEO when it states that "federal involvement is limited to financial aid, guidance when requested, and overstatement to protect against misapplication of funds." (Pet. Brief, p. 14). In making this statement, one can only assume that Petitioner has ignored the relevant provisions of the Code of Federal Regulations, the Community Action Memoranda, and the so-called "guidelines" promulgated by OEO.

Petitioner also states that "[t]he board [of trustees] itself is free of federal control." (Pet. Brief, p. 14). This

is not accurate. First, the composition of the board must comply with the federal statute, i.e., one-third of the board must be "elected public officials," one-third must be "representative of the poor in the area served," and one-third must be representative of "major groups and interests in the community." (42 U.S.C. § 2791(b)). Second, the statute requires that the total membership of the board may not exceed 51 persons, and that no person (other than a public official) may serve on a board for more than three consecutive years or more than a total of six years. Finally, OEO, in this case controlled the board in the most direct and meaningful way possible, i.e., it removed the chairman and "appointed directly" his successor. It is submitted that such controls are inconsistent with an independent contractor relationship.

The above summary of the actual and potential control and day-to-day supervision of virtually every activity of the WTCEO perhaps is unduly lengthy. However, it is necessary in this instance because Petitioner chooses to ignore all of these facts in its one and one-half page affidavit in support of its motion for summary judgment, and chooses to ignore the Code of Federal Regulations, the affidavits of Messrs. Roberts, Breckenridge, and McLain, and the memoranda and guidelines promulgated by OEO. The facts contained in the depositions and affidavits submitted by Respondents, together with the Regulations, Memoranda and Instructions promulgated by OEO, contradict the summary conclusions of Petitioner's affidavit and demonstrate that the WTCEO in fact is operating as a "corporation primarily acting as [an] instrumentalit[y] or agenc[y] of the United States" as that phrase has been defined by decided court cases, as will be shown below. In any event, it is submitted that the aforementioned material clearly offsets the single affidavit of Petitioner and demonstrates that there is a "genuine issue of material fact"

(Rule 56, FRCP) as to whether the WTCEO is a "federal agency" as defined in the Federal Tort Claims Act (28 U.S.C. § 2671).

SUMMARY OF ARGUMENT

The Federal Tort Claims Act defines a "federal agency" as being, inter alia, "corporations primarily acting as instrumentalities or agencies of the United States . . ." (28 U.S.C. § 2671). The Warren-Trumbull Council for Economic Opportunity, Inc. was organized and its Articles of Incorporation as a non-profit corporation were tailored, for the specific purpose of becoming a Community Action Agency of the Office of Economic Opportunity pursuant to the Economic Opportunity Act of 1964.

As a condition of becoming a Community Action Agency and receiving federal funds, the WTCEO became obligated to comply with a myriad of regulations (both then adopted and any thereafter adopted) which related to virtually every aspect of both its long-range and its day-to-day activities, including personnel activities. The bulk of these regulations applied, by their terms, to all agency activities, both federally funded and privately funded (of which there were none in the case of the WTCEO).

In fact, OEO did exercise very close supervision and control in the case of this Community Action Agency. Most startling of all, it removed the duly elected chairman of the board of trustees and "directly appointed" another person to that position with orders to "re-organize" the WTCEO. The voluminous regulations and the specific acts of OEO, *in this case*, belie any notion that the WTCEO was an independent contractor.

The Federal Tort Claims Act is entitled to be given a liberal interpretation, particularly where, as here, the Respondent is a "client" or beneficiary of the Economic Opportunity Act of 1964.

Decided cases hold that in the determination of whether the WTCEO is a "federal agency" or a "contractor with the United States" *the facts of each particular case control.* Thus, it is the actuality of control and the retention of the right to control the day-to-day activities of the WTCEO which control this litigation. When so viewed, it becomes apparent that the exercise of control over the activities of the WTCEO by OEO, and the OEO requirements concerning the corporate structure of the WTCEO, are inconsistent with the legal definition of independent contractor. Consequently, the Court of Appeals properly reversed the granting of summary judgment to Petitioner by the District Court and remanded the case to that Court for "further proceedings consistent with [its] opinion."

ARGUMENT

A. The Economic Opportunity Act of 1964 Made It the Policy of the Federal Government to Eliminate Poverty and This Policy Was Implemented by Means of Community Action Agencies.

The Economic Opportunity Act of 1964 was intended by the President and the Congress to serve as a cornerstone of the war on poverty. This intention was stated clearly in the first section of the Act (42 U.S.C. §§ 2701-2995d):

> "Although the economic well-being and prosperity of the United States have progressed to a level surpassing any achieved in world history, and although these benefits are widely shared throughout the Nation, poverty continues to be the lot of a substantial number of our people.
>
> * * * * *
>
> "It is, therefore, the policy of the United States to eliminate the paradox of poverty in the midst of plenty in this Nation by opening to everyone the opportunity for education and training, the opportunity to work, and the opportunity to live in decency and dignity. It is the purpose of this chapter to strengthen, supplement, and coordinate efforts in furtherance of that policy."

An important element of the Act is Title II thereof, the Community Action Program. In 1965, shortly after the adoption of the Act, the Warren Council for Economic Opportunity, Inc., the predecessor to WTCEO, was organized:

> "[F]or the purpose of obtaining funds made available through the Economic Opportunity Act of 1964 and to act primarily as an instrumentality of the United States by carrying out the purposes of an Economic Opportunity Act. The corporation was carefully organized and the bylaws and regulations tailored to come within the restrictions of the Economic Opportunity Act." (Affidavit of John Breckenridge, App. 36).

Prior to the Economic Opportunity Act of 1964, the federal government administered programs of this nature directly from Washington, D.C. Testimony before Congress indicated that this approach treated only the visible manifestations of poverty but did not get to its symptoms. Consequently, Congress determined to use a more widespread and localized approach in the war on poverty. As stated in the House Report (1964 U.S. Code Congressional

and Administrative News, Volume 2, p. 2910) which accompanied the Economic Opportunity Act:

> "Testimony before the committee has indicated that this kind of wide-ranging participation is essential in getting at the root causes of poverty in the community."

The House Report also was quite specific with respect to the kinds of programs to be undertaken by a Community Action Agency:

> "Because poverty has many interrelated causes, financial assistance under title II will be made available to organizations to assist in the development and operation of action programs which are of sufficient size and scope to show promise of concrete progress toward the elimination of poverty and a cause or causes of poverty."

B. The Federal Tort Claims Act Should Be Liberally Construed in Order to Accomplish Its Purpose of Extending Protection to the Public.

The Federal Tort Claims Act, 28 U.S.C. § 1346(b), provides that the United States shall be liable for torts of "employees of the Government" in a manner identical to private persons. Specifically, 28 U.S.C. § 1346(b) provides:

> "(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court for the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. § 2671 defines the phrase "employee of the Government," and the phrase "federal agency":

> "§2671. Definitions
>
> "As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—
>
> " 'Federal agency' includes the executive departments and independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States.
>
> " 'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.
>
> " 'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty."

Respondents contend that the WTCEO is a "federal agency" because it was a "corporation primarily acting as [an] instrumentalit[y] or agenc[y] of the United States" when it undertook the Westlawn Neighborhood Opportunity Center, the activity in question here. Consequently, the employees of the WTCEO conducting the outing on September 3, 1970, were "employees of the Government". Thus, the United States is liable for their negli-

gence. As the Court of Appeals held, this is particularly true where, as here, the party injured as a result of such negligence is a "client" of the Community Action Agency. That is, "special considerations flow from the peculiar federal responsibility for the safety and wellbeing of persons drawn into the programs of OEO." (Pet. App. 16a).

Many cases have held that the Federal Tort Claims Act should be given a liberal construction, and that the definition of "employee of the Government" should have an expansive reach.[4]

For example, in *Witt v. United States,* 462 F.2d 1261, 1263 (2nd Cir. 1972), the Court stated:

> "This definition [of "employees of the government"] is not without boundaries . . . but quite clearly the statutory language was drafted to have an expansive reach . . ."

Also, see *City of Pittsburgh v. United States,* 359 F.2d 564, 567 (3d Cir. 1966); *Pittman v. United States,* 341 F.2d 739, 741 (9th Cir. 1965), *cert. denied* 382 U.S. 941 (1965); *United States v. Alexander,* 238 F.2d 314, 317 (5th Cir. 1956); *O'Toole v. United States,* 206 F.2d 912, 918 (3d Cir. 1953); *Somerset Seafood Co. v. United States,* 193 F.2d 631, 634 (4th Cir. 1951); *Merchants Nat'l Bank & Trust Co. of Fargo v. United States,* 272 F. Supp. 409, 417-418 (D. N.D. 1967); *Gilroy v. United States,* 112 F. Supp. 664, 666 (D. D.C. 1953); *Rushford v. United States,* 92 F. Supp. 874, 875 (N.D. N.Y. 1950), *aff'd* 204 F.2d 831 (2d Cir. 1953).

---

4. As to the phrase "corporations primarily acting as instrumentalities or agencies of the United States," some of the bills introduced during the first period of legislative reform exclude from suit Government corporations unless the Government owns 51% or more of the shares of the voting stock of such corporations. See, e.g., H. R. REP. No. 286, 70th Cong., 1st Sess. (1928) 6, 7; Print of S. 4377, 71st Cong., 2d Sess. (1930) §301; H. R. REP. No. 667, 69th Cong., 1st Sess. (1926) 6, 7; H. R. REP. No. 2800, 71st Cong., 3d Sess. (1931) 12. The requirement is not contained in the Act, as adopted.

A liberal approach is particularly apropos in the instant case. A Community Action Agency, by virtue of Congressional mandate, consists of persons who are living in poverty. Such an organization is very unlikely to have financial resources adequate to compensate persons damaged by the negligence of their employees. Thus, unless the Federal Tort Claims Act applies, innocent victims, such as Joseph Orleans, will not be compensated, albeit the tortfeasor was engaged in a governmental activity, implementing the federal government's war on poverty, when the tort occurred and the party injured was a "client" of the Agency. The Court of Appeals so held:

> "Both the Federal Tort Claims Act and the Economic Opportunity Act of 1964 were designed to remedy conditions which caused hardship and human suffering. Before the passage of the Tort Claims Act, a person injured as the result of negligence of an employee of the government was denied a remedy which was available to another whose injuries were caused under similar circumstances by the negligence of a private individual or the employee of a private firm. Elimination of this disparity which was based on the outmoded legal fiction that 'the king can do no wrong' achieved a laudable humanitarian result. Congress embarked on another humanitarian effort of monumental proportions when it undertook, with the passage of the 1964 Act, a program for the eventual elimination of poverty in this Nation.
>
> "*When the two Acts here involved are read together and consideration is given to the purpose of each, it does not appear that Congress intended to shield the government from liability in a situation such as this case presents.* The scheme of the 1964 Act is to improve the lot of the poor by involving

them in a multitude of activities which their poverty had previously prevented them from experiencing. To the extent that participation in these activities exposes the beneficiaries of the Act to injury while engaged in approved programs under the supervision of personnel of a community action agency, the United States cannot avoid liability under the Federal Tort Claims Act on the ground that agencies chosen to achieve the purposes of the 1964 Act are not federal agencies or instrumentalities. To equate the status of such an agency with that of independent contractor under these circumstances would be to elevate form above substance." (Emphasis added).

C. The Determination of What Entities Are Federal Agencies Is a Pragmatic One Based on the Activities of the Entity's Operations.

An important part of the definition of "federal agency" is the phrase "*acting primarily* as instrumentalities or agencies . . ." (Emphasis added). This phrase, as courts have recognized, indicates that the determination of which entities are "federal agencies" depends upon "the facts and circumstances of each individual case." (Annotation, "Who Is an 'Employee of the Government' for those whose conduct the United States May be Held Liable Under the Federal Tort Claims Act—Federal Cases," 14 L. Ed. 2d 892, 901.)

It is a pragmatic test, based on "actualities." (See, for example, *Schetter v. Housing Authority of the City of Erie,* 132 F. Supp. 149 (W.D. Pa. 1955).) The determination depends not on whether a particular entity had power to act as other than an instrumentality or agency of the United States, but whether in fact it was doing so at the time the tort occurred. Thus, one must look at the

control being exercised, the supervision which existed, the regulations promulgated, the source of funding, and the reservation of the right to control and supervise rather than to whether the entity might have operated differently than it did.

In this Supreme Court's most recent consideration of the Federal Tort Claims Act, *Logue v. United States,* 412 U.S. 521, 526-527 (1973), such a pragmatic standard was specifically endorsed:

> "We read that portion of the Court of Appeals' opinion quoted *supra* as treating the 'contractor' exemption from the definition of 'Federal agency' in § 2671 as adopting the common-law distinction between the liability of an employer for the negligent acts of his own employees and his liability for the employees of a party with whom he contracts for a specified performance. Both the modern common law as reflected in the Restatement of Agency and the law of Texas makes the distinction between the servant or agent relationship and that of independent contractor *turn on the absence of authority in the principal to control the physical conduct of the contractor in performance of the contract.*" (Emphasis added).

The Supreme Court added:

> ". . . The courts of appeals that have had occasion to decide the question appear to have unvaryingly held that the 'contractor with the United States' language of §2671 adopts the traditional distinction between employees of the principal and employees of an independent contractor with the principal, and to have also held that the critical factor in making this determination is the *authority of the principal to control detailed physical performance of the contractor. . . .*" (Emphasis added).

Quoted with approval in *Logue* was the RESTATEMENT (SECOND) OF AGENCY § 2 (1958):

> "(1) A master is a principal who employs an agent to perform service in his affairs and who controls *or has the right to control* the physical conduct of the other in the performance of the service.
>
> "(2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled *or is subject to the right to control by the master.*
>
> "(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent." (Emphasis added).

Logue, of course, held that on the facts of that case, a local jail was not a federal agency. But the degree of supervision and control was materially different in *Logue v. United States, supra,* than in the instant case. In *Logue,* the United States entered into a formal contract, limited by its terms, with a local jail for the short-term housing of federal prisoners. This Court found that in its formal contract the United States limited its role "to the payment of sufficiently high rates to induce the contractor to do a good job" and to "the right to enter the institution . . . at reasonable hours for the purpose of inspecting the same and determining the conditions under which the federal officials are housed" (412 U.S. at 530 and 531). Moreover, the opinion in *Logue* does not indicate what actions the federal government actually took.

In the instant case, a formal contract limiting the rights of OEO and the duties of WTCEO was not executed.

Rather, the WTCEO, when it assumed the status of a Community Action Agency, obligated itself to abide by all regulations, memoranda, guidelines, etc. of OEO, *then existing or thereafter adopted.* Thus, the power of OEO to control the WTCEO was not delimited, but was open-ended. Thus, the WTCEO in the words of RESTATEMENT (SECOND) OF AGENCY § 2, was "subject to the right to control" by OEO. Moreover, as outlined above, OEO did exercise actual control in a manner inconsistent with the traditional principal-independent contractor relationship.

Inquiry should be focused upon not what could have happened, but what in fact happened. 28 U.S.C. § 2671 uses the phrase "acting primarily," thereby indicating both that the actual state of affairs governs and that an entity need not be *exclusively* an instrumentality of the government.

Logue supports the proposition that what actually happened in each particular case controls the determination of whether a corporation is "primarily acting as [an] instrumentalit[y] or agenc[y] of the United States." In footnote 8 of 412 U.S. at 532, this Court notes that two Court of Appeals decisions involving federal prisoners in local jails reached different results. This Court did not say that those cases were wrongly decided. On the contrary, it stated that those cases "involved findings of control by the Government that are contrary to the determination of the Court of Appeals in this case."

Likewise, Petitioner makes much of the fact that other courts have reached a result different from the Sixth Circuit in this case. That fact, standing alone, means little. To Respondents' knowledge, those other cases did not present such strong evidence of actual federal control over the Community Action Agencies. Certainly, those cases did not reveal that, as here, OEO removed the chairman

of the board of trustees and "appointed directly" his successor (App. 38).

Thus, when actual control and the reservation of future control by OEO of the WTCEO is analyzed, it is clear that the WTCEO is a "federal agency." It was organized solely for the purpose of receiving federal funds and carrying out federally sponsored programs (App. 31 and 36); it received cash funds only from the federal government (App. 36 and 39); it implemented only federal programs (App. 37); and it was regulated closely by OEO as to its day-to-day operations (App. 37), e.g., admission to meetings, access to documents and personnel policies (including the appointment of the chairman of the Board of Trustees).

D. OEO Exercised Control and Reserved an Unlimited Right to Control the WTCEO, an Entity Engaged in Implementing Governmental Policy. In These Circumstances Logic and Precedent Compel the Conclusion That the WTCEO Was an Instrumentality or Agency of the United States.

OEO, by means of its promulgated "regulations, Community Action Memoranda, standards, issued program guidelines, OEO Instructions, assurances [and] grant conditions" (45 C.F.R. § 1067.1-1(a)), reserves the right to regulate and supervise a Community Action Agency in virtually any manner OEO deems wise. (This reservation of authority also was admitted by Mr. Verduin (Depo., p. 17, *supra*, p. 16). See also, 42 U.S.C. § 2796(b), 42 U.S.C. § 2790(a), and OEO Instruction 6002-01, in which OEO specifically retained the right to adopt "such further policies and procedures as may be issued by the Office of Economic Opportunity.") Further, as was shown above, it was the intention of Congress that the CAA be a principal instrument in the war on poverty (42 U.S.C.

§ 2791). That is, the CAA was an essential element of the implementation of a federal governmental program. When a CAA, such as the WTCEO, acts in furtherance of the implementation of this federal governmental program, when it is closely regulated by OEO in doing so, and when such regulation is subject to undefined expansion, then such a CAA comes within the definition of a "federal agency" contained in 28 U.S.C. § 2671.

The decisions reflect considerable flexibility in defining the phrase "federal agency," and in defining when a corporation is "primarily acting" as an "instrumentalit[y] or agenc[y] of the United States." No one factor is determinative. Rather, it is the amalgamation of all aspects of the entity's actual operation, and the control thereof by the federal government, which determines the issue. For example, in *Duba v. Schuetzle*, 303 F.2d 570 (8th Cir. 1962), the court held that a local county committee of a state agricultural committee (which was appointed by the Secretary of Agriculture) was a federal agency, notwithstanding that the county committee members were selected by cooperating farmers within the county and that the regulations under which the county committee was created provided that such county committee "shall be generally responsible for carrying out in the county the agricultural conservation program . . ." The court found that the County Committee was subject to the "general direction and supervision" of the state committee, and that this was enough to give it the status of a governmental agency. The court found that it did not have jurisdiction of the case for reasons not relevant here, but it did state that the county committee constituted a "governmental agency."

Similarly, in *Delgado v. Akins*, 236 F. Supp. 202 (D. Ariz. 1964), the court held that an employee of an identical

county committee was an "employee of the Government" pursuant to 28 U.S.C. § 2671. The court acknowledged that the employees were hired by the county committee, that the government exercised "no direct control over the withdrawals" over county committee funds, and that "the work of the field reporter, Mr. Akins, was under the County Committee." Nonetheless, because the committee was subject to audit from Washington, D.C. and because numerous bulletins, hand books, and regulations establishing standards of conduct were promulgated by the federal government, the court held that Akins was an "employee of the Government."

Thus, these cases stand for the propositions that one can be an "employee of the Government" notwithstanding that there is local control of the hiring process, that salaries are paid on non-government checks, that the federal government exercises no direct control over disbursements of funds, and that details of implementing federal programs are left to local discretion.

Martarano v. United States, 231 F. Supp. 805 (D. Nev. 1964), held that one hired and paid by the State of Nevada, and whose retirement plan and industrial compensation were provided for through state agencies, nonetheless was an "employee of the [federal] Government" because his temporary work assignment placed him under the supervision of the Fish and Wildlife Service of the Department of the Interior. The Court stated:

> "The Government argues that Sweeney was an employee of the State of Nevada and not of the United States because he was hired by the State Personnel Department, was paid by the State, and received all fringe benefits of employment through state agencies. We do not agree. In respect of the vicarious liability

> of a master for the tortious misconduct of his servant, the controlling principle is that responsibility follows the right of supervision and control.
>
> "Courts have held that the fact of compensation by the United States or the use of a government vehicle does not in itself qualify a person as an employee of the Government. Fries v. United States, supra; Harris v. Boreham, (3 CCA 1956) 233 F.2d 110. The converse is true in our case. The fact that Sweeney was compensated as an employee by the State of Nevada does not disqualify him from status as an employee of the Government at the time of the collision."

Significantly, the court stated that it was the "right of supervision and control" which was critical to its decision. In the instant case, there is no question but that the OEO regional office had the *right* of supervision and control. Its regulations, 45 C.F.R., Parts 1067-1070, so provide, and it was admitted by the Chicago Regional Director (Verduin Depo., p. 17). Moreover, OEO exercised that right in the most meaningful way possible, it directed who was to be Chairman of the Board of Trustees of the WTCEO.

The significance of the *potential* ability of the federal government to control was emphasized in *Witt v. United States*, 462 F.2d 1261 (2d Cir. 1972). There, the court held that one McQuirk was acting as an employee of the United States Disciplinary Barracks when he picked up prisoners and transported them in his trailer to the Fort Leavenworth Hunt Club for a "volunteer" work detail. McQuirk had no previous relationship to the Barracks whatsoever. In fact, he had been employed by one Harrison, who in turn had been employed by the Hunt Club, which was not a federal agency. The court stated:

> "Here, although no written agreement existed, McQuirk was *impliedly authorized* by the Commandant of the Disciplinary Barracks to transport prisoners in his custody to a work detail (for which, as will be seen below, prisoners received credit), to supervise or help supervise that detail and to return the prisoners. Moreover, McQuirk was certainly amenable to some degree of control by the Disciplinary Barracks. In such circumstances, McQuirk was 'acting on behalf of a federal agency in an official capacity, temporarily . . . in the service of the United States . . . without compensation.'" (Emphasis added).

Again, the critical point was that the federal government had *power* to control, and thus the entity was a federal agency regardless of whether control actually had been exercised. In the instant case, the Code of Federal Regulations, the OEO Instructions, the Community Action Memoranda, etc. make manifest the extent of both actual, and reservation of potential, control of a CAA by OEO.

Other cases have held that an entity may be a federal agency even though it does not receive any governmental appropriation or funds. For example, in *United States v. Holcombe*, 277 F.2d 143 (4th Cir. 1960), an officers' mess at a naval base which employed civilians and received no funds whatsoever from the federal government was held to be a "federal agency" and its employees to be "employees of the Government." (In the Navy, officers who choose to do so pool their food allowances in the officers' mess. These meal allowances are the only source of funds for the operation of the mess.) Critical to the holding was the court's determination that the officers' mess was "a governmental activity." Similarly, in the instant case, the WTCEO was performing a governmental function, i.e., it was an important vehicle for implementing

the government's war on poverty. Just as an officers' mess is a principal means for feeding officers, so also the WTCEO was a principal means of implementing a governmental policy to eliminate poverty.

An important case is *State of Maryland v. Manor Real Estate and Trust Co., et al.*, 176 F.2d 414 (4th Cir. 1949). The United States leased certain housing units from a private corporation and thereafter engaged an independent real estate firm (Dugan) "to manage the premises, and [he] remained in charge from 1943 to 1947 . . ." (p. 415). During this period, the housing units became infested with rats. The plaintiff's husband was bitten by a rat and died. Just as in the instant case, the United States claimed that Dugan was an independent contractor and hence the death was not caused by the negligent act or omission of any "employee of the Government." The court rejected this contention:

> ". . . It is said that Dugan was in complete charge of the management of the property as an independent contractor and hence Anderson's death was not caused by the negligent act or omission of any employee of the government. There is no substance in this contention because the evidence shows that Dugan was subject to the detailed supervision of the Public Housing Authority, and that in his contract for the management of the property he agreed to be bound by the regulations issued by the government in the form of a contract managers' manual, *and by all amendments thereto.*" (Emphasis supplied).

A similar case is *Schetter v. Housing Authority of the City of Erie*, 132 F. Supp. 149 (W.D. Pa. 1955), where the court held that the Housing Authority of the City of Erie was a federal agency by virtue of a lease agreement it entered into with the United States for the operation of

a housing project owned by the federal government. The lease agreement provided, inter alia, that Erie's budget was to be submitted to the United States, Erie was to provide all personnel, supplies and services to "properly manage, operate, maintain and administer the project" (p. 151), and Erie was to maintain complete records which could be audited by federal officials. The lease agreement contained other terms found in virtually every lease agreement of large tracts of land, e.g., the prohibition of an assignment of mortgage by Erie, surrender of the premises to the United States in good condition upon termination of the agreement, and the right of the United States to sell any part of the project without the consent of Erie. The court held:

> "In view of the foregoing provisions of the lease, justice requires the piercing of the veil which shrouds the relationship between Erie and the United States. The mere fact that the Public Housing Administration, an arm of the United States, delegated its authority to Erie in lieu of acting directly under the attempted form of a lease, does not change or permit the evasion of responsibility.
>
> "Although the contract seeks to relieve the government of tort liability by identifying Erie as a lessee and an independent contractor, nevertheless this court must be guided by the actualities of the relationship which exists.
>
> "Under all facts and circumstances, I must conclude that Erie is not an independent contractor since Erie was controlled by the United States with respect to the performance of the undertaking provided by the agreement between the United States and Erie. Restatement of Agency, Section 2(3); Pennsylvania Railroad Co. v. Allegheny County, 324 Pa. 216, 188 A. 178.
>
> "In view of the terms of the instrument in question, I am compelled to find that Erie was an *instrumentality* of the United States, and that the United States is a proper defendant to the instant proceeding."

See also, *Toth v. United States*, 107 F. Supp. 37 (N.D. Ohio 1952), another housing case, where under a similar lease agreement, the lessee was held to be a federal agency. An important factor in the court's decision was its belief that the lease agreement was intended "to effectuate federal housing policies" (p. 38). An entity which did so, when it also was subject to control and supervision by the federal government, was a federal agency.

These cases demonstrate that it is "the actualities of the relationship" which determine whether or not an entity is a federal agency, particularly where the entity is carrying out a governmental function. Moreover, the cases hold that the United States will be bound by its *actions*, i.e., it cannot unilaterally decide whether an entity is to be a federal agency. Finally, they demonstrate that even a public body, the City of Erie, can be a federal agency in appropriate circumstances.

In the instant case, Petitioner bases its argument on the notion that Congress intended the WTCEO to be an independent organization, and consequently, regardless of what regulations and instructions were issued by OEO officials and regardless of what actions they took, the WTCEO must be considered an independent contractor rather than a "corporation primarily acting as an instrumentalit[y] or agenc[y] of the United States." To this end, Petitioner cites general policy statements from the

Economic Opportunity Act, but ignores other statutory provisions, the pervasive regulatory scheme and actual events.

Schetter and *Logue* demonstrate the error of Petitioner's argument. It is the government's actions, the extent of governmental control and the extent of the reservation of potential control by the government, which determine whether an entity is a federal agency. Consequently, it is highly relevant that the WTCEO did not receive any funds but federal funds and did not undertake any programs but OEO sponsored programs. OEO asserts that it does not control hiring and firing within a CAA. However, the scope of OEO's personnel guidelines, its "suggested" wage scales, and its direct replacement of the chairman of the Board of Trustees with an OEO man, all belie these assertions and compel the conclusion that OEO had direct involvement in personnel policy, at least on the facts of this case and as to the WTCEO. This conclusion is buttressed by the regulations which permit OEO to control the WTCEO in virtually any manner it desires. Further, the WTCEO is given a "public agency" character by the regulatory provisions which require it to open its files to any member of the public and to permit any member of the public to attend and to speak at its meetings.

CONCLUSION

The facts establish that the WTCEO was entirely funded by federal funds, that the government expressed its unlimited right to control, that the government exercised detailed control and that the agency's activities were limited to the implementation of programs expressly designated by Congress and the OEO. Under these facts the WTCEO, in operating its Neighborhood Opportunity Center, was an agency or an instrumentality of the United States.

For the foregoing reasons, it is respectfully submitted that the decision of the Sixth Circuit Court of Appeals should be affirmed and this case should be remanded to the District Court for a trial on the merits on this issue and on all other relevant issues.

Respectfully submitted,

WILLIAM E. PFAU, JR.
CHARLES F. CLARKE
JAMES P. MURPHY
Attorneys for Respondents Joseph V. Orleans and Joseph A. Orleans

Of Counsel:

PFAU, COMSTOCK & SPRINGER
900 City Centre I
Youngstown, Ohio
(216) 747-3507

SQUIRE, SANDERS & DEMPSEY
1800 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-9200